

FEDERAL CIRCUIT COURT OF AUSTRALIA

GIANG v MINISTER FOR IMMIGRATION & ANOR [2017] FCCA 3195

Catchwords:

MIGRATION – Application for partner visa – review of decision of Administrative Appeals Tribunal – whether the Tribunal erred by making unreasonable findings based on the evidence before it – whether the Tribunal failed to consider reg.1.15A of the *Migration Regulations 1994* (Cth) – whether the Tribunal misdirected itself and failed to ask the right question – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 368

Migration Regulations 1994 (Cth), reg.1.15A, cls.309.211, 309.221 of sch.2

Cases cited:

Chey v Minister for Immigration & Citizenship [2007] FCA 871

Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686

Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004) 78 ALJR 992; [2004] HCA 32

Zhang v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 30

Applicant:	QUYEN GIANG
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 3025 of 2016
Judgment of:	Judge Smith
Hearing date:	15 November 2017
Date of Last Submission:	15 November 2017
Delivered at:	Sydney

Delivered on: 15 November 2017

REPRESENTATION

Counsel for the Applicant: Ms U Okereke-Fisher

Solicitors for the Applicant: Vietaust Lawyers

Counsel for the Respondents: Mr G Johnson

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The application be dismissed.
- (2) The applicant pay the first respondent's costs fixed in the amount of \$5,800.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3025 of 2016

QUYEN GIANG

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Delivered Extempore and Revised)

1. This is an application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) made on 29 September 2016. The Tribunal affirmed a decision of a delegate of the Minister to refuse to grant a Partner (Provisional) (class UF) (subclass 309) visa to a citizen of Vietnam and her two children. The applicant on the review before the Tribunal was the sponsor of the application for the visa and was married to the visa applicant. I will refer to him as the review applicant and to his wife as the visa applicant.

Background

2. The visa applicant, as I have noted, is a citizen of Vietnam who married the review applicant in Vietnam on 11 August 2014. She applied for a visa on 8 October 2014 on the basis of her relationship to her husband. It was a criteria of the grant of that visa that the visa applicant be the spouse or de facto partner of an Australian citizen, permanent resident or eligible New Zealand citizen, both at the time of the application and at the time of the decision: see cls.309.211 and 309.221 of sch.2 to the *Migration Regulations 1994* (Cth) (**Regulations**).
3. The definition of “spouse” is provided in s.5F of the *Migration Act 1958* (Cth) (**Act**) and I set out that provision below:
 - (1) *For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*
 - (2) *For the purposes of subsection (1), persons are in a **married relationship** if:*
 - (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (c) *the relationship between them is genuine and continuing; and*
 - (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
4. Regulation 1.15A of the Regulations prescribes the matters that are to be considered for the purposes of determining whether a person comes within s.5F of the Act and I set out the provisions of reg.1.15A below:
 - (1) *For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or*

more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or*
- (b) a Partner (Provisional) (Class UF) visa; or*
- (c) a Partner (Residence) (Class BS) visa; or*
- (d) a Partner (Temporary) (Class UK) visa;*

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses; and*
- (b) the nature of the household, including:*
 - (i) any joint responsibility for the care and support of children; and*
 - (ii) the living arrangements of the persons; and*
 - (iii) any sharing of the responsibility for housework; and*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married to each other; and*

- (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
- (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*
- (4) *If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).*

5. On 26 October 2015, a delegate of the Minister decided to refuse to grant the visa applicant a visa on the basis that the delegate was not satisfied that she met the definition of “spouse” of the review applicant. The review applicant, as is required by the Act, applied to the Tribunal for review of that decision.

Tribunal's decision

6. The Tribunal made its decision on 29 September 2016. The reasons for the Tribunal's decision are summarised in the respondent's submissions at [5] to [7] and I set that out below:

5. *The Tribunal affirmed the decision under review: CB 173-183. The Tribunal identified the issue in the case as being whether the applicant and the visa applicant were in a genuine spousal relationship at the time application and at the time of decision: [48]; CB 179. The Tribunal noted that it had considered all of the circumstances of the*

relationship, including ‘specifically the matters set out in r.1.15A(3) of the Migration Regulations’: [49]; CB 179.

6. *The Tribunal accepted the parties were married under a marriage that was valid for the purposes of s.5F(2)(a): [50]; CB 180. The Tribunal then considered, as it was required to, and by reference to the evidence given by the applicant and the visa applicant, the matters prescribed in reg. 1.15A(3), being the financial aspects of the relationship ([51]-[52]), the nature of the household ([53]-[58]), the social aspects of the relationship ([59]), and the nature of the persons’ commitment to each other ([60]-[61]).*
7. *The Tribunal concluded that it was not satisfied that the visa applicant and the applicant were at the time of application or at the time of its decision in a spousal relationship, and accordingly the visa applicant did not meet the requirements for the grant of a partner visa.*

Consideration

7. In his application for judicial review, the review applicant raises four grounds, although at the hearing he abandoned ground 4 and amended ground 1 so as not to rely upon the assertion that the Tribunal provided vague directives as to the nature of the evidence it required from the applicants.
8. Before considering each of the grounds in turn, it is necessary to say something at a high level about the task that was set of the Tribunal by the Act and the Regulations. First, it was not in contest that the matters set out in reg.1.15A(3) are relevant considerations that must be considered by the Tribunal at risk of jurisdictional error: see, for example, *Zhang v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 30 at [15] and *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 78 ALJR 992; [2004] HCA 32.
9. However, what is and is not considered for the purposes of reg.1.15A(3) of the Regulations must be determined upon the circumstances of the case and by proper appreciation of the written reasons given by the Tribunal for its decision pursuant to s.368 of the Act. Proper appreciation of that role goes a significant way to resolving the issues in these proceedings. In *Chey v Minister for*

Immigration & Citizenship [2007] FCA 871 (**Chey**), Kenny J dealt with this issue at [49] and [50] of her reasons and I set those out below:

49. *The Tribunal is bound to take into account the considerations set out in reg 1.15A(3): see Nassouh v Minister for Immigration and Multicultural Affairs* [2000] FCA 788, cited with approval in *Zhang v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 30 (“Zhang”) at [15] per Moore, Mansfield and Dowsett JJ. Failure to do so will amount to jurisdictional error: see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 24 per Gummow and Hayne JJ. The Full Court said in *Zhang* at [14], where an issue arose as to whether the Tribunal had considered the factors in reg 1.15A(3)(c):

“The reasons of the Tribunal are not to be read with an eye attuned to the ready perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shal Liang* (1996) 185 CLR 259 at 271-272 and 291. On the other hand, it is important to review the Tribunal’s reasons to be satisfied that the Tribunal has in fact had regard to the matters which it must address. The routine citation of statutory provisions or authorities will not necessarily demonstrate that regard.”

50. *The Tribunal’s reasons refer to reg 1.15A(3), as well as the birth of the child. The Tribunal discussed “the evidence and issues” relevant to a spousal relationship under headings appropriate to a discussion relevant to reg 1.15A(3). Under the headings “[t]he social aspects of the relationship” (reg 1.15A(3)(c)) and “[t]he nature of the persons’ commitment to each other” (reg 1.15A(3)(d)), the Tribunal referred to the birth of the child to Mr Chey and Ms Tong. The reference in connection with subparagraph (d) is more detailed than in connection with subparagraph (c). In connection with subparagraph (d), the Tribunal made the comment referred to previously that “the parties have had a child together, [which was] usually a very strong indicator of commitment”, although not, for the reasons stated by the Tribunal, to be treated as such in the present case. The Tribunal subsequently commented, that “[a]lthough the relationship resumed to the extent that the sponsor has had a child the Tribunal [was] not satisfied that the relationship at the time of this decision has the degree of mutual support and companionship contemplated by regulation 1.15A”.*

10. At [51] of *Chey*, her Honour also referred to the decision of Dowsett J in *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686 (**Davis**) at [35], where his Honour stated that:

... There is no obligation upon a tribunal of fact to make findings as to whether it accepts or rejects every allegation made in the course of evidence. In some cases allegations may be so fundamental to the ultimate matter for determination that findings concerning them will be essential. In most cases, however, individual facts will be of less significance than the overall effect of the evidence. It may, in those circumstances, be unnecessary to make possibly hurtful, damaging or embarrassing findings of fact which are not necessary to the ultimate decision. ...

11. His Honour there was considering the reasons of a Tribunal made in consideration of the matters under reg.1.15A(3) and which apply for that reason to the circumstances of this case.

First Ground

12. The first ground is that the Tribunal made erroneous findings and failed to consider claims. Ultimately, in oral submissions, Counsel for the applicant submitted that the error made by the Tribunal was that its findings, when compared to the evidence before it, were not reasonable or accurate, and that the Tribunal failed to assess the evidence on a basis that was accurate. The particular evidence referred to in this ground, is set out in [6] at pages 5 to 6 of the applicant's written submissions and I set that out below:

6. *The applicants' claims and evidence with respect to their future plans are as outlined below:*

- a) *In relation to the Applicant: CB 177 at [25]* – “Asked how he thought he would manage a blended family he told the Tribunal that it didn't matter who the father was. Asked how he would support his family on his income, he told the Tribunal that he was planning to find extra work and open a small business to make some money. Pressed for more detail, he told the Tribunal that he only required a small amount of capital to have a business that did odd jobs and clean-ups. He said he already had some small tools but would be able to buy some more once the business got going. He said that his wife would be able to help”.

- b) *In relation to the Visa Applicant, **CB 178 at [34]** “She told the Tribunal that she would look for work when she gets to Australia and also study to learn English. She told the Tribunal that the Review Applicant was going to put an ad in the paper and start a cleaning up business. Asked if they had any kind of business plan or estimate of how much they would need to set up such a business and how much they expected to earn, the visa applicant said she would find out when she came to Australia.”*
- c) *In paragraph 6 of the Applicant's statutory declaration **[CB 165]**, in response to the question where they would live when his wife arrives Australia, he stated “..... We would either move out or move to uncle's place.”*
- d) *In Paragraph 5 of the Applicant's statutory declaration **[CB 168]**, she states, “My husband and I have discussed that in the event that we are unable to rent our own place we will temporarily stay at my Uncle's place Bui Van Chin until we can rent our own place”.*
- e) *At Paragraph 5 of Van Chi BUI's statutory declaration **[CB 167]**, he states “When I was informed that they were getting married, I was overjoyed. When they got married. I called them to congratulate them. At the same time, I offered them a place to stay when Thanh, Qiuyen and their children come to Australia to reunite with Quyen if they don't have a place to stay because my house has 3 bedrooms and 2 bathrooms. I also have a granny flat at the back of my house, yet I am living there by myself”*
- f) *At paragraph 4 of Le Phat Than Duy's statement **[CB 170]**, “I planned that after I arrived in Australia I will continue will my studies if I am able to. If I am unable to continue with my studies, I will look for a job”.*

(Emphasis in original)

13. The applicant submitted that the overarching response by the Tribunal, to this evidence, was that the visa applicant and the review applicant had made no real plans for their future: see, for example, [45] and [55] to [58] of the Tribunal's reasons. That much may be accepted. However, that does not mean that the Tribunal failed to take into

consideration the evidence put forward by the visa applicant and the review applicant, nor does it mean that the Tribunal made a finding about that evidence that was not open to it, or was somehow inaccurate.

14. What is important to understand is that the Tribunal was engaging in what is ultimately an evaluative process in determining what is a genuine and continuing relationship within the meaning of s.5F of the Act. That means that, when it came to consider what the applicants had said they were going to do when they came to Australia, it did so on an evaluative and qualitative basis. Simply put, having done so, it was not satisfied that the plans, such as they were, according to the evidence of the applicants, were suggestive of a continuing and genuine relationship. Indeed, it concluded at [58] of its reasons that, taken as a whole, that is, the evidence taken as a whole, the Tribunal was not satisfied that the parties would be living together as a family.
15. I cannot see that anything said by the Tribunal inaccurately summarised or reflected the applicant's evidence. Indeed, it set out all of that evidence in the summary of the evidence from [10] to [43] of its reasons. At [49], to which I will return in due course, it is stated that it had regard to all of that evidence. In respect of ground 1, the fact that it had regard to that evidence in respect of the matters raised by the applicant, is made clear by the matters referred to in [51] to [59]. For those reasons, I am satisfied that the Tribunal's evaluation of the evidence was in accordance with its obligation under reg.1.15A(3), in determining the question posed by cls.309.211 and 309.221 of the Regulations and s.5F of the Act. For that reason, I reject ground 1.

Second Ground

16. The second ground overlaps to a significant extent with the first ground. It is that the Tribunal failed to consider the matters required by reg.1.15A, and so fell into jurisdictional error. To the extent that the applicant relies upon the matters in [6] at pages 5 to 6 of his written submissions, this ground is rejected for the same reason as I have given, in respect of ground 1. He also relies upon the matters referred to in [20] of his written submissions, although he has withdrawn reliance on [20.c]. I set out paras.a, b, d and e of [20] of the written submissions for the review applicant below:

20. *In essence, the Tribunal failed to consider the following claims:*

a) *At paragraphs 14, 15 and 16 of the Decision Record [CB 175-176 at 14, 15, 16], the Review Applicant provided details on how his relationship with the Applicant commenced, how they met, the circumstances leading to their relationship, their previous relationships, the travels to Vietnam and the parties' marriage. The Applicant also noted that the plan was for the visa applicant to learn English and look for a job, upon her arrival in Australia. Subsequently, once they have enough savings, they will purchase a house and have 2 more children.*

b) *At paragraph 17 of the Decision Record [CB 176 at 17], the Visa Applicant stated that her ex-husband was a drunk and was violent towards herself and her children.*

...

d) *At paragraph 34 of the Decision Record [CB 178 at 34], the Visa Applicant stated that she will learn English and look for work when she arrives Australia. She also explained the details of what would seem to a business plan for a cleaning agency business that the parties intend to commence.*

e) *With respect to Reg 1.15A(3)(b) the Tribunal failed to consider that given the fact that the Applicant and Visa Applicant lived in separate countries, there was limited opportunity for them to live together as spouses*

(Emphasis in original)

17. The first of these matters in essence raises two things. First, to the background to the relationship formed between the visa applicant and the review applicant and, in particular, to the nature of the relationships which each of them had prior to their relationship. For instance, the visa applicant gave evidence that her former husband had become violent and gambled and drank and the review applicant said that his relationship had broken down some years beforehand. They said that the fact that they had both come from broken relationships gave them a

common point of view and that they shared each other's sadness and joy: see [43] of the Tribunal's reasons.

18. The review applicant also relies upon the visa applicant's evidence that she planned to learn English when she came to Australia and to look for a job upon arrival and, once they had enough money, they would purchase a house and have two more children.
19. In respect of the very last aspect of this ground, it is clear, from [55] of its reasons, that the Tribunal did take that into account. It referred, in the last sentence of that paragraph, to a blended family of four children. That is a clear reference not only to the visa applicant's current two children, but to the proposal of the applicants, to have two further children together. So that matter may be set to one side as having been considered. In essence, the review applicant's argument relies on the fact that nowhere in [50] to [61], where the Tribunal was expressly dealing with the matters referred to in reg.1.15A(3), by reference to subheadings, did the Tribunal refer to the previous relationships and the other circumstances relating to their relationship, as well as to the travels to Vietnam and their marriage. At [50], the Tribunal did accept the marriage, and that must be a reference to its consideration of that fact, and that may be left to one side.
20. The Minister made two submissions in this respect. First, that the background to the applicants' relationship, including their previous relationships, was not part of the "circumstances of the relationship" within the meaning of reg.1.15A(2) of the Regulations. He said, in effect, that the circumstances of the relationship are the circumstances as they exist now. While that argument has some force, in my view, it must depend upon the circumstances of the case. It may be, for instance, that the way in which parties came to meet each other might bear some relevance to the questions raised by reg.1.15A. It might be that, for instance, the people had met, or said to have met, at a party and been married the following day, and then made an application for a visa the day after that. The circumstances of them meeting at the party may be said to be relevant to the existence of a genuine and continuing relationship.
21. However, in the circumstances of this case, it is not necessary to determine that question, and I accept, for present purposes, that the

previous relationships do, to a certain extent, fall within the “circumstances of the relationship” referred to in reg.1.15A(2) of the Regulations. However, bearing in mind the matters I have referred to above, in particular, the decisions in *Chey* and *Davis*, the obligation of the Tribunal, when considering the matters in reg.1.15A, and recording its consideration in a written statement, in accordance with s.368 of the Act, I am satisfied that the Tribunal did take into consideration all of those matters.

22. First of all, the Tribunal set out each of the matters relied upon by the review applicant: see [14]-[16] of its reasons. Secondly, at [49], to which I made a brief reference earlier, it said that not only had it had regard to all of the documentary evidence, which includes the statements provided by and in support of the visa applicant and the review applicant’s evidence, but also the oral evidence provided by each of the applicants at the hearing, and the post-hearing submission.
23. It said, following that, that it had considered all of the circumstances of the relationship. I accept that that is a fairly broad statement, and may, in some circumstances, not suggest what it means on its face. However, given the detail with which the Tribunal recorded each of the matters of the background to the relationship, and all of the other matters relied upon by the applicants, in [10] to [47] of its reasons, I am satisfied that when it came, at [50] and following, to address specifically the subheadings referred to in reg.1.15A(3) of the Regulations, it was only doing so in respect of the matters that it considered were critical, and that that consideration was done against the background of an acceptance of all the matters otherwise referred to by the applicants, including the background to their relationship, the fact that they had come from marriages, the fact that the visa applicant planned to learn English and look for a job upon her arrival in Australia and, as I have said, once they had enough savings, would purchase a house and have two more children.
24. In those circumstances, I am not satisfied that the Tribunal failed to consider the matters in [20.a] of the applicants’ written submissions. The same reasoning applies to both [20.b] and [20.d] which, in them, note that the evidence, or the particular matters relied upon were contained, themselves, in the Tribunal’s reasons, seen at [17] and [34],

respectively. In respect of [20.e], the argument is that the Tribunal failed to consider the fact that the applicant and the visa applicant lived in separate countries, and that there was limited opportunity for them to live together as spouses. It is clear that the Tribunal was aware of, and took into account the fact that the visa applicant and the review applicant lived in different countries. It refers, at [54] of its reasons, for example, to the fact that the review applicant visited the visa applicant in Vietnam. However, its consideration of the matter was, to a large extent, framed by reference to the way in which the applicants had given their evidence and made their case. They had claimed that during the review applicant's visit, that they had lived together. It was this that the Tribunal dealt with at [54] and, ultimately, rejected.

25. In essence, then, the fact that living in a separate country made it difficult for the applicants to live together as spouses, did not really arise on the claims. Simply put, it may have been one of the circumstances which were accepted, but it was not important because what was critical was that the claims and evidence concerning the so-called joint household in Vietnam were rejected by the Tribunal. It may be noted that the Tribunal went on to consider the possibility of a future household in Australia (see [55] to [58] of its reasons) thereby showing that it did not consider that it was decisive of the review that there had been previously no household. For those reasons, ground 2 is rejected.

Third ground

26. The third ground is that the Tribunal misdirected itself and asked the wrong question. In this respect, the applicants' argument was that the Tribunal asked itself and was overly perturbed by the question of whether the review applicant could support the visa applicant when she came to Australia. The argument was that the Tribunal misunderstood its task and, rather than deciding whether there was a genuine and continuing relationship, as required by s.5F of the Act, in light of cls.309.211 and 309.221 of sch.2 to the Regulations, simply determined whether there was sufficient wealth to support the existence of such a relationship. He argued that a genuine and continuing relationship can exist between two parties with minimal income and means of livelihood, and that the requirements under cls.309.211 and 309.221

are not the exclusive domain of the wealthy or those with financial means.

27. That latter submission may easily be accepted. Indeed, it is common experience that people with significant wealth do not necessarily, themselves, have a genuine relationship. However, the Tribunal was not distracted from its task in the way suggested by the review applicant. It did address the review applicant's ability to support his wife and their children when they came to Australia (see [52] of its reasons) however, it did so as part of an assessment of the financial aspects of that relationship. In this respect, it had also considered the applicants' knowledge of each other's financial affairs and the prospect of the review applicant himself starting a cleaning and handyman venture. The lack of joint ownership of assets, lack of joint liabilities, the non-pooling of financial resources and the lack of legal obligations owed to the other, or the sharing of day-to-day household expenses are all matters referred to in sub-reg.1.15A(3)(a) of the Regulations.
28. Further, it is clear from the balance of the Tribunal's reasons that it did not consider, as decisive of the review, the question concerning the review applicant's ability to support his wife and her children when they were to come to Australia. It went on to consider other aspects of the relationship, including the nature of the household, social aspects of the relationship and their commitment to each other. In other words, while the Tribunal did have regard to the review applicant's financial circumstances, it was only part of an overall evaluative process when determining whether, within s.5F of the Act, the review applicant and his wife were spouses. For those reasons, the Tribunal did not fall into the error in ground 3, and that ground is rejected.

Conclusion

29. There is no jurisdictional error in the Tribunal's decision, and the application will be dismissed.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Judge Smith

Associate:

Date: 19 December 2017